IN THE

SUPREME COURT OF THE UNITED STATES

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_____ Term, 1969, NO. _____

VERNON O. BARNETT, Petitioner

vs.

STATE OF TEXAS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Joel W. Westbrook
Attorney for Petitioner
Vernon O. Barnett

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I N D E X

	Page
Citations to Opinions Below.	1
Jurisdiction	2
Questions Presented.	3
Constitutional and Statutory Provisions Involved	7
Statement of the Case.	11
Reasons for Granting Certiorari.	26
1. Application of Miranda to "Consent" Search and Seizure. .	26
2. Application of Orozco to public place detention for questioning	37
3. Specificity of warning of right to counsel prior to interrogation and right to court appointed counsel during interrogation	39
Conclusions.	46.
Appendix -- Opinion of the Court of Criminal Appeals of Texas. . .	App. 1

TABLE OF CASES

	Page
Atwell vs. United States, 398 F.2d 507 (1968)	45
Bumper vs. North Carolina, 391 U.S. 543, 20 L.Ed.2d 797, 88 Sup. Ct 1788 (1968)	34
Fendley vs. United States, 384 F.2d 923 (November 2, 1967)	44
Honig vs. United States, 208 F.2d 916 (8th Cir. 1953)	32
Johnson vs. Zerbst, 304 U.S. 458, 464 (1938)	34
Judd vs. United States, 190 F.2d 649, 651 (D.C. Cir. 1951) (dictum)	34
Martinez vs. United States, 333 F.2d 405, 407 (9th Cir. 1964) (dictum)	33
Miranda vs. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 Sup. Ct. 1602, (June 13, 1966)	24,26,27,30,31,35 36,37,43,44,45,46
Oregon vs. Williams, 432 P.2d 679 (October 13, 1967)	36
Orozco vs. State of Texas, ____ U.S. ____, 22 L.Ed.2d 311, 89 Sup. Ct. ____ (March 25, 1969)	25,26,27,35,36,38
People vs. Burke, 47 Cal.2d 45, 301 P.2d 241 (1956)	33

Page

People ex rel Gordon vs. U. S., 328 U.S. 8, 90 L. Ed. 1049, 66 Sup. Ct. (1946) 27

People vs. West, 144 Cal. App.2d 214, 300 P.2d 729 (Dist. Ct. App. 1956) 33

Preston vs. United States, 376 U.S. 364, 84 Sup. Ct. 881, 11 L.Ed.2d 777, (1964) 46

Schmerber vs. California, 384 U.S. 757, 16 L.Ed.2d 908, 86 Sup. Ct. 1826 (June 20, 1966). 36,37

Taylor vs. State, 420 S.W.2d 601 (1967) 30

United States vs. Gregory, 204 F.Supp. 884 (S.D.N.Y. 1962) aff'd, 309 F.2d 536 (2d Cir. 1962) 32,33

United States vs. MacLeod, 207 F.2d 853 (7th Cir. 1953). 32

United States vs. Roberts, 179 F.Supp. 478 (D.D.C. 1959). 34

United States vs. Smith, 308 F.2d 657, 633 (2d Cir.) (dictum), cert. denied, 372 U.S. 906 (1963). . . . 34

Weeks vs. State, 417 S.W.2d 716, 719 (third rehearing denied 14 June, 1967), certiorari denied, 389 U.S. 996 46

Wong Sun vs. United States, 371 U.S. 471, 83 Sup. Ct. 407, 9 L.Ed.2d. 441 (1963) 46

CONSTITUTIONAL PROVISIONS AND STATUTES

Page

Fourth Amendment to the United States Constitution 3,7,16,26,34,37

Fifth Amendment to the United States Constitution 3,5,6,7,16,37,39

Sixth Amendment to the United States Constitution 3,5,6,7,39

Fourteenth Amendment to the United States Constitution. 3,5,6,8,16

28 U. S. C. Sec. 1257(3). 3

Article 15.17, Vernon's Annotated Texas Code of Criminal Procedure, Vol. 1, supp. p. 51. 8,10,21,40,42

Article 38.22, Vernon's Annotated Texas Code of Criminal Procedure, Vol. 4, supp., p. 41 9,40

Article 40.09, Vernon's Annotated Texas Code of Criminal Procedure 22

RULES OF PROCEDURE

Supreme Court Rule 19(1). 27

ARTICLES

Page

"Consent Searches: A Reappraisal After Miranda v. Arizona," 67 Columbia Law Review, 130 27

"Effective Consent to Search and Seizure," 13 University of Pennsylvania Law Review 260 27,32

"Validity of Consent While In Custody," 9 A.L.R.3d 858 27

IN THE

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_____ Term, 1969, No _____

VERNON O. BARNETT, Petitioner

vs.

STATE OF TEXAS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas, entered in the above entitled case on April 23, 1968, affirming the judgments and sentences of the 54th Judicial District Court, McLennan County, Texas [1]

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Criminal

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[1] Petitioner's Second Motion for Rehearing was overruled on June 11, 1969

Appeals has not yet been reported, but is attached hereto as an Appendix

The Trial Court did not deliver an opinion

JURISDICTION

Petitioner was tried before a jury on an indictment charging him with the unlawful possession of marihuana. He was found guilty and sentenced by the Trial Court to confinement in the State Penitentiary for a term of not less than two (2) nor more than ten (10) years

The jury's verdict of finding the Defendant guilty and the jury's verdict of punishment were both returned on April 22, 1968, judgment entered on April 23, 1968, and the Defendant was sentenced by the Court, in accordance with the verdict of the jury, on June 24, 1968

On the same day the Defendant's Motion and Amended Motion for New Trial were overruled by operation of law

Petitioner subsequently appealed to the Court of Criminal Appeals of the State of Texas. The Trial Court's judgment was affirmed by that Court on February 19, 1969. On May 7, 1969, the Court of Criminal Appeals overruled without written opinion Petitioner's Motion for Rehearing, and on June 11, 1969, the Court of Criminal Appeals overruled, without written opinion, Petitioner's Second Motion for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Is a search and seizure violative of the Fourth, Fifth and Sixth Amendments, as applied to the States by the Fourteenth Amendment, when grounded solely on a consent given by the Petitioner, [-2] without his having been previously

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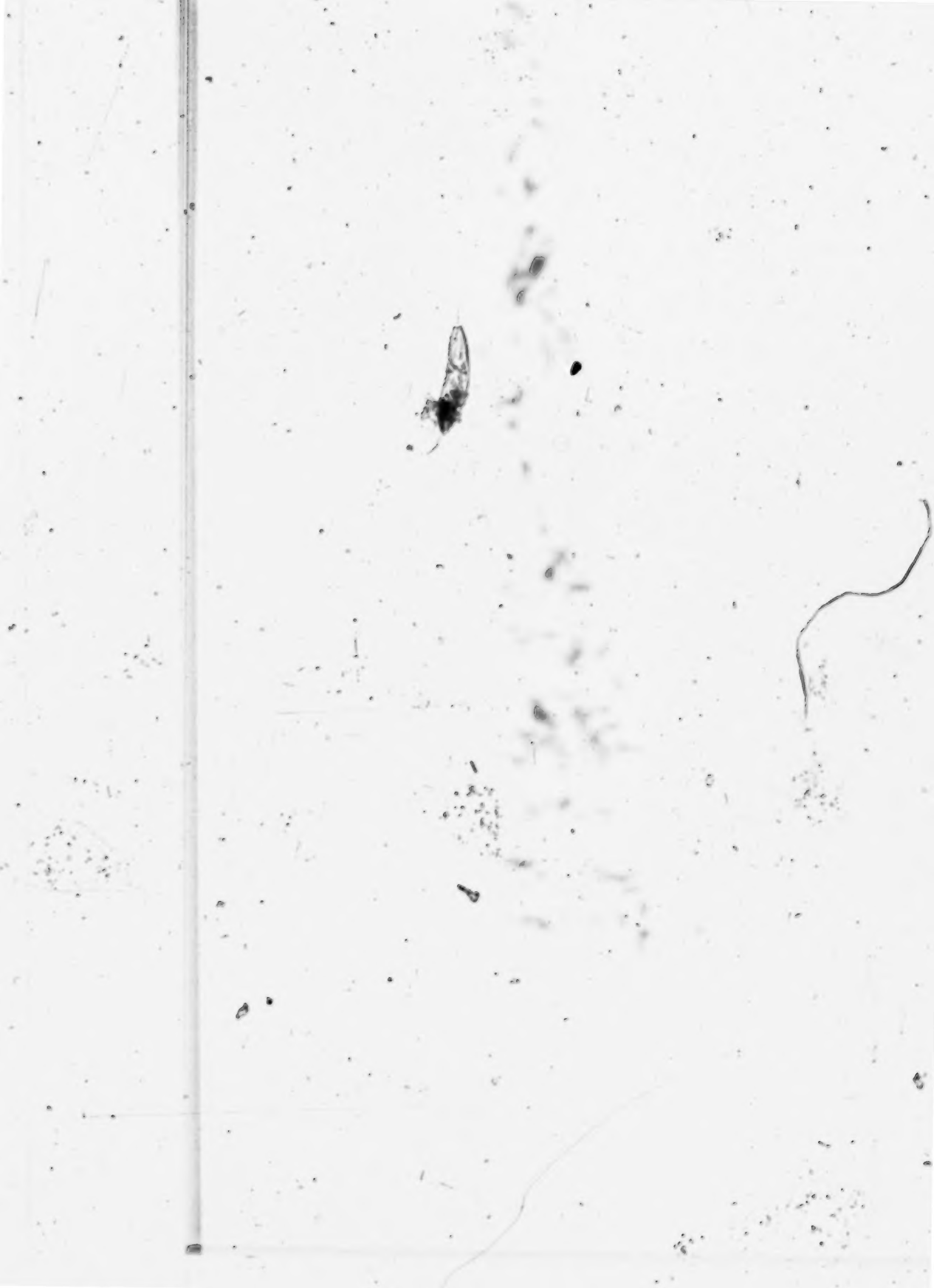
-2. Nowhere during trial or on appeal has the State claimed the search and seizure was justified on the basis of a search warrant, or as (Footnote continued on page 4.)



warned of his right to counsel, without his previously being advised that incriminating evidence found as a result of the search could be used against him, and without being previously advised that he had the right to refuse consent, under circumstances establishing that the Petitioner, prior to giving the alleged consent, had been significantly "deprived of his freedom of action" by the searching officer, these circumstances being:

(a) The searching officer (a white man) intercepted Petitioner (Negro) in a Negro dance hall at a time when the searching officer admittedly had no reason for arresting Petitioner

(b) The searching officer demanded Petitioner's identification and queried Petitioner about his past record

---

incident to a lawful arrest, or upon any basis other than consent (See Appellee's Brief, p. 4, which is included in the record as filed in the Supreme Court of the United States.)

(c) Before consent to search was obtained, the searching officer had made a determination (not explicitly communicated to Petitioner) that he would not permit Petitioner to leave the place of interrogation and search

(d) Petitioner knew that marijuana was in the briefcase he gave "consent" to be searched, although previously, when asked what he had "with him", he had said he had only a briefcase with some music in it.

"2. Are confessions violative of the Fifth and Sixth Amendments, as applied to the States by the Fourteenth Amendment, when given without any advice whatsoever with respect to the accused's right to counsel under circumstances establishing that petitioner had been significantly deprived of his freedom by the interrogating officer, these circumstances being:

(a) The interrogating officer (a white man) intercepted Petitioner (Negro) in a Negro dance hall at a time when the interrogating

officer admittedly had no reason for arresting Petitioner.

(b) The interrogating officer demanded Petitioner's identification and queried Petitioner about his past record.

(c) Before consent to search was obtained the interrogating officer had made a determination (not explicitly communicated to Petitioner) that he would not permit Petitioner to release the place of interrogation and search.

3 [Said confession violative of the Fifth and Sixth Amendments, as applied to the States by the Fourteenth Amendment, where, before making the confession, the Petitioner, although advised of his right to counsel, including court appointed counsel, was not advised of his right to consult with counsel prior to interview, nor of his right to have court appointed counsel with him during the interview.

-3 This is a written confession taken by an Assistant District Attorney, after Petitioner has been arrested and taken before a magistrate.

b.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States reads in pertinent part as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

The Fifth Amendment to the Constitution of the United States reads in pertinent part as follows:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

The Sixth Amendment to the Constitution of the United States reads in pertinent part as follows:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial."

Article 38.22 Vernon's Annotated Code of Criminal Procedure, Vol. 4, supp., p. 41,[-5] reads in pertinent part as follows:

"1. The oral or written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible if:

(a) it be shown to be the voluntary statement of the accused taken in the presence

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-5. Acts 1965, 59th Leg., Vol. 2, p. 317, Ch. 722, as amended by Acts 1967, 60th Leg., p. 1740, Ch. 659.

of an examining court in accordance with law; or

(b) it be made in writing and signed by the accused, and show that the accused has at some time prior to the making thereof received from the person to whom the statement is made the warning set out in Subsection (c)(1), (2) and (3) below or received from the magistrate the warning provided in Article 15.17, and shows the time, date, and place of the warning and the name of the person or magistrate who administered the warning; or

(c) it be made in writing to some person who has warned the defendant from whom the statement is taken that

(1) he has the right to have a lawyer present to advise him either prior to any questioning or during any questioning,

(2) if he is unable to employ a lawyer he has the right to have a lawyer appointed

to counsel with him prior to or during any questioning, and

(3) he has the right to remain silent and not make any statement at all and that any statement he makes may be used in evidence against him at his trial.

The defendant must knowingly, intelligently, and voluntarily waive these rights prior to and during the making of the statement."

STATEMENT OF THE CASE

Petitioner, a Negro, was intercepted by Officer Conley, white, a narcotics agent for the Texas Department of Public Safety, accompanied by two white agents for the Texas Liquor Control Board, as he was leaving Walker's Auditorium, a Negro night club, on September 14, 1967.[6]

-6. Tr., Vol. II, pp. 101-104, 128.
(Footnote continued on p. 12)

Officer Conley, who at the time of the interception of Petitioner had no reason to arrest him, and did not recognize him personally, stopped Petitioner as he was leaving the auditorium, identified himself and the other officers, and asked the Petitioner, and only the Petitioner, for his identification. Officer Conley detained the Petitioner in order to establish Petitioner's identification, and in order to secure a search warrant if Petitioner did not consent to a search. Officer Conley questioned Petitioner as to whether or not he had any prior arrests, and Petitioner told him that he had been arrested in 1963 in San Antonio. Asked for what, Petitioner said barbiturates. After establishing that Petitioner had arrived in

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(Note: The official pagination is placed in the lower left and right hand corners, the pagination at the top of the page being the internal pagination of the court reporter. References are to the official pagination.)

Waco in a friend's car, which was outside, Officer Conley asked Petitioner if he had anything in the car, and Petitioner answered that he had a briefcase with his music, contracts, and other personal effects or papers.[7]

When Petitioner's friend unlocked the car at the request of one of the other officers, Officer Conley asked the car owner if the briefcase in the back seat belonged to him, at which time the Petitioner stated, "No, it's mine. My briefcase."[8]

Officer Conley then asked Petitioner to retrieve the briefcase from the back seat and lay it on top of the car. Petitioner complied and also complied with Officer Conley's request to open the briefcase.[9]

-7. Tr., Vol. II, pp. 104-105, 107, 109-112, 127, 133-134; Vol. III, p. 190.

-8. Tr., Vol. II, pp. 112-113.

-9. Tr., Vol. II, pp. 113.

Officer Conley removed a small paper bag from the briefcase and asked Petitioner if the bag was his, and Petitioner said that it was. Officer Conley then asked him what was in the small paper bag and Petitioner responded "Mr. Conley, you know what's in the bag. Marihuana."[10]

Officer Conley stated that he then put Petitioner under arrest.[11]

At no time did Officer Conley advise Petitioner of his right to counsel, of his right to refuse consent to search, of the purpose of the search, or that evidence resulting from the search could be used against him. Officer Conley did not claim probable cause, but asserted that his persistence upon search was a matter of curiosity.[12] Officer Conley took Petitioner

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-10. Tr., Vol. II, pp. 113-114.

-11. Tr., Vol. II, p. 114.

-12. Recalling Jacque Barzun's observation that "Curiosity without wonder is a swinish emotion." Tr., Vol. II, pp. 127, 129-130; Vol. III, pp. 188.

before a magistrate, who advised him of his right to counsel, including court appointed counsel, but did not advise him of his right to counsel prior to interrogation, or of his right to court appointed counsel during interrogation.[13]

Indeed, the magistrate testified that he told Petitioner that "if he did decide that it would be to his best interest to give an interview, that he would have a reasonable time in which to get an attorney. . ."[14]

Petitioner executed a written confession after being interrogated by an Assistant District Attorney, who gave him a limited warning, and failed to warn that he could have a court appointed attorney present during the interview, or that he could consult with an attorney prior to the interview.[15]

-13. Tr., Vol. II, pp. 95-98, 114-115, State's Pretrial Exhibit 1.

-14. Tr., Vol. III, pp. 199-200

-15. Tr., Vol. II, p. 144

Petitioner challenged the introduction into evidence of the marihuana, as well as other exhibits, and of his oral and written statements, by pretrial Motion to Suppress,[16] as well as by objections during the trial.[17]

These challenges to the use of this evidence were based upon the contentions addressed to the Court in the Motion to Suppress that the Petitioner was arrested without warrant and without probable cause in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, that the search incident to such arrest was therefore illegal and all of the fruits of such search must be suppressed, that all of the statements made by Petitioner after his arrest were made without counsel for Petitioner being present and without an intelligent waiver of

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-16. Tr., Vol. I, pp.5-6.

-17. Tr., Vol. III, pp. 195-196, 216-217.

counsel, and were therefore taken in violation of his constitutional rights and must be suppressed.

The additional specific objections made during the trial were that the purported consent was invalid because, prior to being asked to give his consent, Petitioner had not been informed that he had the right to advice of counsel with respect to giving his consent, had not been informed of the purpose of the search, had not been informed that the results of the search could be used against him in a criminal prosecution, and had not been advised of his right to refuse to give consent.

With respect to Petitioner's oral admission of the ownership of the briefcase (sometimes referred to during the testimony as an attache case) and his oral consent to examine the contents of the attache case, Petitioner's counsel during the trial asked for permission to take the witness on voir dire examination to establish the

custodial status of the Petitioner, which permission was denied by the Court.[18]

Following the testimony during the trial of Officer Conley the Petitioner's counsel moved to strike his testimony with respect to Petitioner's statements after he stated that the briefcase was his on the grounds that the undisputed evidence at the pretrial hearing and during the trial established that after the Petitioner admitted the briefcase was his, Petitioner was then in custody, and that under Texas law any oral admission against interest he might give would not be admissible, and further because the undisputed evidence showed that he neither had counsel present, nor was he advised of his right to have counsel present before he made any statements about the briefcase, nor was there any evidence that he was advised that he had the right to make no statement whatsoever with respect to the briefcase after

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-18. Tr., Vol. III, pp. 173-176.

he had admitted its ownership.[19]

Objection was also made on the grounds that the officer did not advise Petitioner of the purpose of the search, that there was no warrant and no evidence of probable cause, that the search was not incident to a legal arrest, and that the consent was invalid because there was no evidence that he was told that the result of the search could be used in evidence against him or of his right to refuse consent.[20]

Petitioner also during the trial objected to the introduction into evidence of the written statement taken from Petitioner after he had been taken before a magistrate, because the Petitioner was in custody as a product of an illegal arrest, and was not advised that he had the right to have court appointed counsel with him during the interrogation by the officers

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-19. Tr., Vol. III, p. 191.

-20. Tr., Vol. III, p. 193.

or by the District Attorney, and because there was a failure on the part of the State to sustain its burden of proof that Petitioner had waived any of his rights prior to execution of this statement, and specifically because of the failure of the State to sustain its burden of proving that Petitioner intelligently waived his rights to have court appointed counsel be present before and during interrogation, and that the evidence failed to show that he was advised of the right to have court appointed counsel to confer with him to determine whether or not he wished to make a statement.[21]

All of the foregoing challenges to the introduction into evidence of the marihuana and of the oral admissions, oral consent, and the written confession, were by the Trial Court overruled.

The Trial Court filed findings and conclusions of fact and law on issue of the voluntary nature of the alleged confession of the

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[21] Tr., Vol. III, p. 210-211

Petitioner. The Trial Court then filed Amended Findings and Conclusions of Fact and Law, differing only from the original findings and conclusions in the following regard: In his original findings, the Trial Court, in addition to finding that the Petitioner was warned in accordance with the provisions of Article 15.17 by both the magistrate (John Cabaniss) and the Assistant District Attorney (Tommy Tatum), in his finding and conclusion No. 9 found "That prior to making and signing said confession, the defendant intelligently, knowingly and voluntarily chose to waive his right of assistance of legal counsel, -22 whereas in his Amended findings and conclusions No. 9, the Trial Court found "That prior to and during the making and signing of said confession, the defendant knowingly, intelligently and voluntarily waived all of his legal rights of which he was

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-22. Tr., Vol. I, p. 20.

duly warned of the said Tommy Tatum and the said John Cabaniss."[23]

All of these challenges to the introduction into evidence of the oral admission against interest, the oral consent, the written confession, and the marihuana were repeated in the Trial Court following conviction, in Petitioner's Amended Motion for New Trial, which the Trial Court overruled.[24]

Finally Petitioner filed in the Trial Court, in accordance with Texas procedure,[25] his Appellate Brief[26] in which his contentions were grouped around three Grounds of Error, one dealing with admission of physical evidence, one with oral statements against

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-23. Tr., Vol. I, p. 23.

-24. Tr., Vol. I, pp. 54,77.

-25. Article 40.09, V.C.C.P.

-26. Included as a separate document in the record prepared for the Supreme Court of the United States by the Clerk of the Court of Criminal Appeals of Texas.

interest, and one with the written confession.[27]

The Trial Court by order entered on December 26, 1969, rejected these Grounds of Error.

The Court of Criminal Appeals also rejected Petitioner's contentions, ignoring some of them, in its opinion delivered February 19, 1969, included herein as an Appendix.

In Petitioner's Motion for Rehearing,[28] filed March 5, 1969, in addition to repeating the three basic Grounds of Error as his Fourth, Fifth, and Sixth Points of Error,[29] Petitioner asserted error in the Court of Criminal Appeals' opinion by:

1. Its holding that the Trial Court had found that Petitioner "was advised of his

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-27. Tr., Vol. III, p. 254.

-28. Included as a separate document in the record prepared for the Supreme Court of the United States by the Clerk of the Court of Criminal Appeals.

-29. Motion for Rehearing, pp. 14-16.

right to counsel prior to and during the making and signing of the confession. . .and, that he knowingly, intelligently and voluntarily waived his right to counsel";[30]

2. Its holding that Petitioner "made no issue concerning the voluntariness of the confession or waiver of counsel during the trial";[31]

3. Its holding that Petitioner "was not under arrest at the time he made oral admissions against interest and at the time of the alleged consent to search, Petitioner pointing out that actual custody in the conventional sense was neither required by Texas law nor by Miranda vs. Arizona, 384 U. S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602, citing to pages 444 and 478 of 384 U. S. to show that "custodial interrogation" included being "otherwise deprived of his

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-30. Motion for Rehearing, pp. 1-2. Appendix pp. 10-11, infra.

-31. Motion for Rehearing, p. 4. Appendix p. 11, infra.

freedom by the authorities in any significant way".[-32]

By overruling the Motion for Rehearing without written opinion on May 7, 1969, the Texas Court of Criminal Appeals rejected all these contentions.[-33]

In Petitioner's Second Motion for Rehearing, filed May 21, 1969, he urged that the Court of Criminal Appeals erred in its disposal of the Motion for Rehearing by failing to apply the United States Supreme Court decision of Orozco vs. State of Texas, _____ U. S. _____, 22 L. Ed. 2d 311, 89 Sup. Ct. (March 25, 1969). (Note: Petitioner also reasserted his Points of Error of his original Motion for Rehearing.) Petitioner also urged that the Court of Criminal Appeals in its disposal of his Motion for

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-32. Motion for Rehearing, pp. 8, 13-14. Appendix, pp. 6-7, infra.

-33. See Certificate of Clerk of Court of Criminal Appeals.

Rehearing erred in failing to recognize vital errors in its original opinion in basing its key conclusions upon seriously incomplete and inaccurate views of the record which were brought to that Court's attention in the original Motion for Rehearing.[-34]

This Second Motion was also overruled on June 11, 1969, again without written opinion.[-35]

REASONS FOR GRANTING CERTIORARI

1. The first question presented, which in effect is whether or not warnings of Fourth Amendment rights, or the warnings required by Miranda vs. Arizona, 384 U. S. 436, 16 L. Ed. 2d, 694, 86 Sup. Ct. 1602, 10 A.L.R. 3d 974 (June 13, 1966), perhaps via Orozco vs. State of Texas, _____ U. S. _____, 22 L. Ed. 2d 311, 89 Sup. Ct. _____.

-34. Second Motion for Rehearing, p. 2.

-35. See Certificate of Clerk of Court of Criminal Appeals.

(March 25, 1969), or both, apply to a "Consent" search and seizure, where the accused has been significantly deprived of his freedom of action, is a question of substance which has not heretofore been determined by the United States Supreme Court, and it is a question decided by the Texas Court of Criminal Appeals in a way probably not in accord with Miranda and Orozco.[-36]

Furthermore, there is a lack of uniformity in State Court decisions dealing with this question;[-37] and a conflict between Federal Courts of Appeal.

At the outset there is a problem in

-36. Supreme Court Rule 19(1). "Effective Consent to Search and Seizure", 13 University of Pennsylvania Law Review 260; "Consent Searches: A Reappraisal After Miranda vs. Arizona", 67 Columbia Law Review 130; "Validity of Consent While In Custody", 9 A.L.R. 3d 858.

-37. People ex rel Gordon vs. U. S., 328 U. S. 8, 90 L. Ed. 1049, 66 Sup. Ct. (1946).

presenting these reasons for granting certiorari on this question.

While clearly the question is one of substance not heretofore decided by this Court, the Texas Court of Criminal Appeals' opinion has obscured the validity of the "custodial" element of the question; viz, whether or not the Petitioner was being significantly deprived of his freedom of action when he gave his "consent" to the search.

The Texas Court of Criminal Appeals found in its opinion, delivered February 19, 1969, that Petitioner was not under arrest at the time he gave his consent. In support of this finding the Court cited testimony of the searching officer to this effect. -38

On Motion for Rehearing, filed on March 5, 1969, Petitioner called to the attention of the Texas Court of Criminal Appeals that the searching officer also testified, on

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-38. Appendix, pp. 3, 5, infra.

cross-examination, that he would have detained Petitioner so that he could obtain a search warrant after Petitioner told him that he had a briefcase and had been arrested in 1963 in San Antonio for possession of barbiturates, and further that he would have detained Petitioner for the purpose of establishing his identification after the Petitioner stated his name was Spot Barnett, by reason of information that the officer had prior to that time when Barnett had been arrested for barbiturates. The Texas Court's attention was further directed to the officer's testimony that he would not have permitted Petitioner to depart after he admitted ownership of the briefcase, prior to the alleged consent and prior to Petitioner's admission that the sack found in the briefcase following consent to search contained marihuana. -39

-39. Motion for Rehearing, pp. 8-11.

The Texas Court's opinion herein clearly reflects the Court's view that, absent arrest, Miranda does not apply.

> "Miranda vs. Arizona, 384 U. S. 436, 86 Sup. Ct. 1602, 16 L. Ed. 2d 694, expressly holds that the warning on the right to remain silent and the right to counsel is required only in custodial interrogation. See Taylor vs. State, 420 S. W. 2d 601. Since appellant was not under arrest, it is not necessary to decide whether after an arrest a warning on the right to remain silent and to have counsel should be given before consent to search is obtained."[-40]

A proper reading of Miranda would have shown the Texas Court that its view inadequately appraises the use in Miranda of the term "custodial interrogation". In Petitioner's Motion for Rehearing Miranda's application was urged as

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-40. Appendix, p. 7, infra.

applying not only to arrest, but to situations where an accused is "otherwise deprived of his freedom of action in any significant way", and Petitioner apprised the Texas Court in his Motion for Rehearing that these quoted words were worded conjunctively, rather than disjunctively, in the original Miranda opinion.[41]

Under the facts of this case, obviously Petitioner felt that he was not free to leave when he was being interrogated by the searching officer, nor free to decline to accompany the officer to the car, nor free to withhold consent to search. Otherwise he would have declined cooperation in at least one of these options, especially in the light of his knowledge that he had a briefcase in the car, and marihuana in the briefcase, and no apparent hope that this would not be discovered if he

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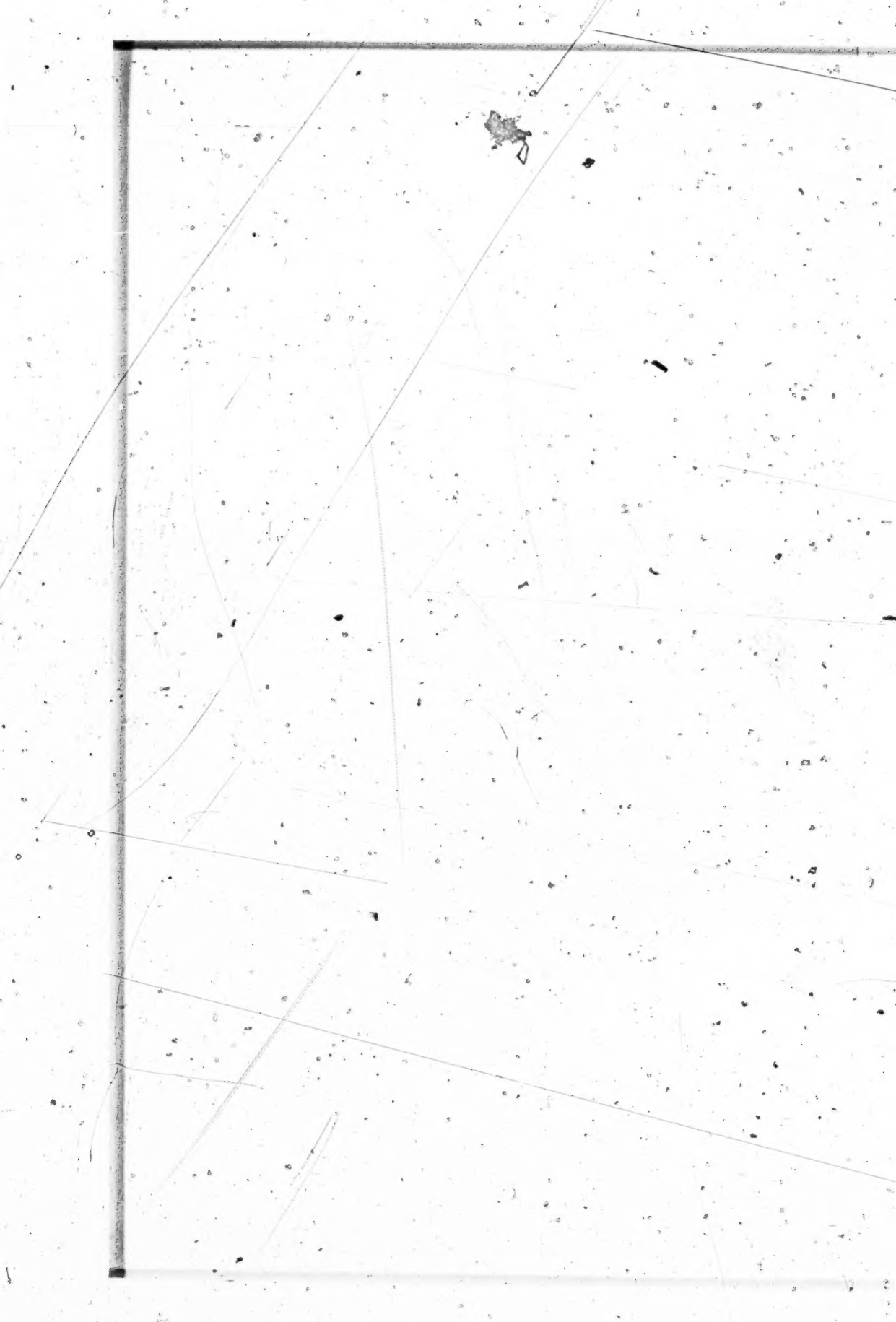
-41. Motion for Rehearing, pp. 13-14.



cooperated with the officers.

As stated in the very comprehensive article "Effective Consent to Search and Seizure", 113 University of Pennsylvania Law Review 260, 267:

> "When a suspect allows a search, while confronted only with relatively mild police conduct, his choice would seem to be made for acceptable reasons. However, there are many cases of reportedly innocuous police conduct in which the suspect allowed a search which seems to be obviously contrary to his interests.[33]
>
> "In United States vs. Gregory,[34] the court made the following observation: '[T] he alleged consent under the facts

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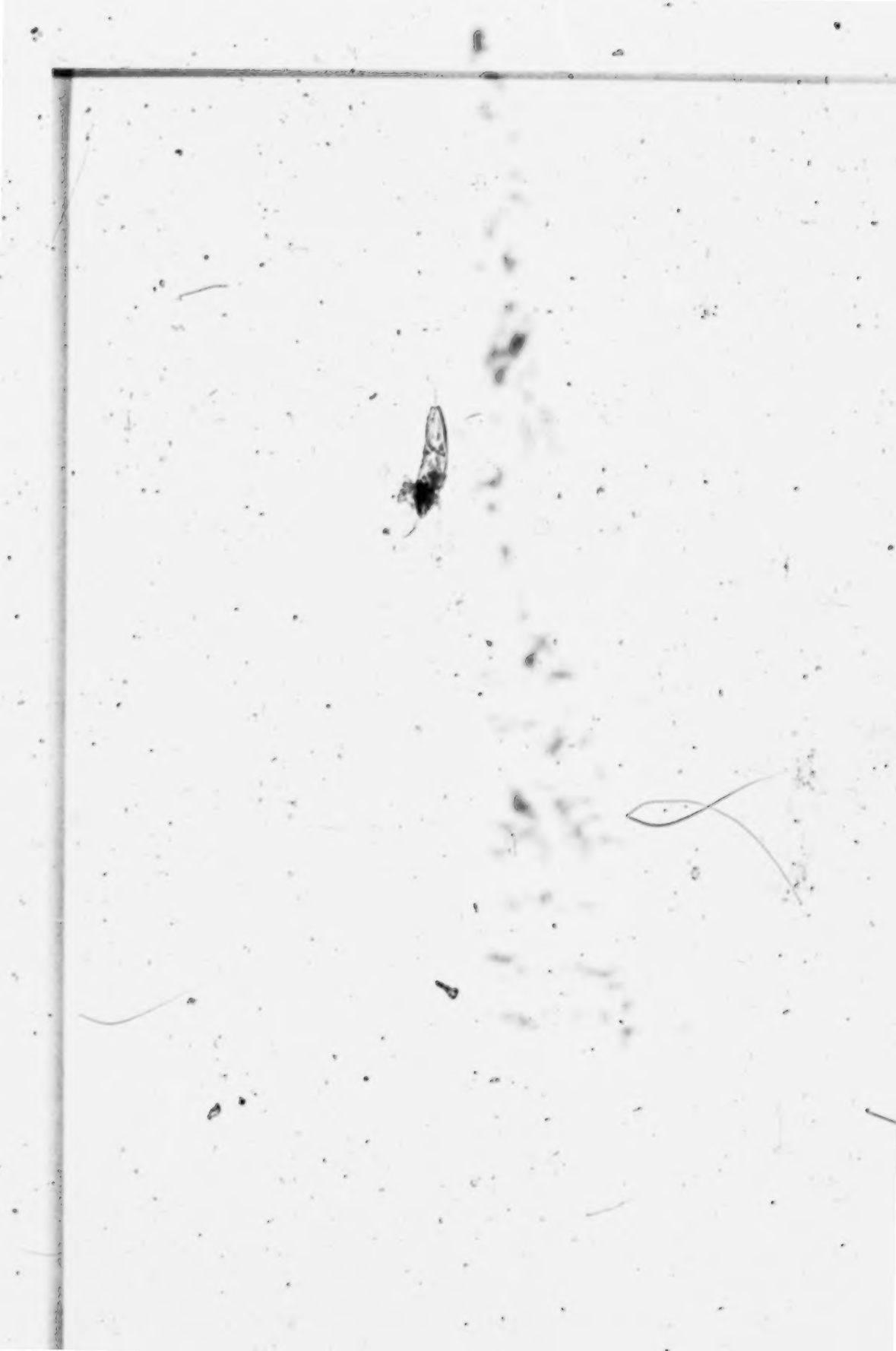
"33. See, e.g. Honig v. United States, 208 F. 2d 916 (8th Cir. 1953); United States v. MacLeod, 207 F. 2d 853 (7th Cir. 1953)."

"34. 204 F. Supp. 884 (S.D.N.Y. 1962) aff'd, 309 F. 2d 536 (2d Cir. 1962)."



and circumstances here presented--a defendant at once denying that narcotics are in his room and at the same time agreeing to a search which obviously must yield narcotics--is not in accord with common experience.'[35] Since the situation described in Gregory seems to arise frequently,[36] one can conclude only that a substantial number of suspects are choosing searches for reasons not apparent from the reported facts.

"One possibility is that some suspects allow searches merely because they are ignorant of their right to refuse to allow

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"35. Id. at 885. Compare Martinez v. United States, 333 F. 2d 405, 407 (9th Cir. 1964) (dictum); People v. Burke, 47 Cal. 2d 45, 301 P. 2d 241 (1956); People v. West, 144 Cal. App. 2d 214, 300 P. 2d 729 (Dist. Ct. App. 1956)."

"36. See cases cited note 33 supra."

them. Such a suspect should not be held to have effectively waived his Fourth Amendment[37] right. There can be no 'intentional relinquishment . . . of a known right'[38] until a person knows that the right exists. This knowledge is essential if the choice to permit a search is to be a meaningful one."

This being a consent case, the prosecution had the burden, the very considerable burden, of proving that the Defendant's "consent" was intelligently and voluntarily given. Bumper vs. North Carolina, 391 U. S. 543, 20 L. Ed. 2d 797, 88 Sup. Ct. 1788.

"37. United States v. Roberts, 179 F. Supp. 478 (D.D.C. 1959). Many courts have said that a consent to search must be intelligently given. See, e.g., United States v. Smith, 308 F. 2d 657, 663 (2d Cir.) (dictum), cert. denied, 372 U. S. 906 (1963); Judd v. United States, 190 F. 2d 649, 651 (D. C. Cir. 1951) (dictum)."

"38. Johnson v. Zerbst, 304 U. S. 458 464 (1938)."

Orozco vs. State of Texas, supra, reversing the Texas Court of Criminal Appeals, was delivered March 25, 1969, approximately a month after the Texas Court's original opinion herein, and approximately six (6) weeks before, on May 7, 1969, the Texas Court overruled, without written opinion, Petitioner's Motion for Rehearing.

Orozco, in our view, illuminated Miranda by emphasizing the custodial nature of being "otherwise deprived of his freedom of action in any way" (p. 315 of 22 L. Ed. 2d) by applying Miranda to an interrogation where the accused was in his own bed and in his own home. The applicability of Orozco was urged upon the Texas Court in Petitioner's Second Motion for Rehearing, which was overruled without written opinion on June 11, 1969.[-42]

In the light of the Texas Court's obscuring of the "custodial" element of the

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-42. Motion for Rehearing, pp. 2-5.

first question presented, we can readily understand how that Court decided--by avoiding--this question of substance in a way probably not in accordance with Miranda and Orozco.

The Supreme Court of Oregon in Oregon vs. Williams, 432 Pac. 2d 679 (October 13, 1967), in our view properly stated the rationale for the application of Miranda to a search and seizure situation: "The same prophylaxis is necessary whether the interrogation is used to obtain a confession or establish a suspect's guilt through his disclosure of evidence pointing to his guilt." (p. 683 of 432 Pac. 2d)

Schmerber vs. California, 384 U. S. 757, 16 L. Ed. 2d 908, 86 Sup. Ct. 1826 (20 June, 1966, in the majority opinion delivered one (1) week after Miranda, contains highly significant dicta supportive of the Oregon Supreme Court's application of Miranda. The majority held that Schmerber's Fifth Amendment privileges were not violated because there was no

"testimonial compulsion", and that his right to counsel was not violated because, since he was not entitled to assert his Fifth Amendment privilege, he had "no greater rights because counsel erroneously advised him that he could assert it" (p. 766 of 384 U. S. and 917 of 16 L. Ed. 2d).

Counsel in this instant case would have correctly advised Petitioner that he had the right to refuse consent, so as to avoid incriminating himself, and so as to avail himself of the right of privacy afforded by the Fourth Amendment, and accordingly failure to advise him of his right to counsel would appear to violate Miranda as illuminated by Schmerber.

2. The Texas Court of Criminal Appeals also decided a question of substance in a way probably not in accord with Miranda vs. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 Sup. Ct. 1602, 10 A. L. R. 3d 974

(June 13, 1966), and Orozco vs. State of Texas, _____U. S. _____, 22 L. Ed. 2d 311, 89 Sup. Ct. _____ (March 25, 1969), when it upheld the Trial Court's action admitting into evidence Petitioner's crucial oral statements against interest made in Walker's Auditorium that the briefcase in which the marihuana was to be found was his, and that the sack within the briefcase contained the marihuana.

The Texas Court gave no consideration whatsoever to the question of whether or not Petitioner was being significantly "deprived of his freedom of action", as discussed above with respect to the search and seizure question.

For the reasons given in the above search and seizure discussion, we believe it clear that Petitioner, when he made these crucial oral statements against interest, had been significantly deprived by the interrogating officer of his freedom of action.

If so, it being undisputed that he

was given no warnings whatsoever before the interrogation which elicited these oral statements against interest at Walker's Auditorium, Petitioner's Fifth and Sixth Amendment rights were violated.

3. The admissibility of the written confession made after Petitioner had been formally arrested and taken before a magistrate where advice respecting the right to counsel did not include advice that Petitioner was entitled to counsel prior to interrogation, nor advice that he was entitled to court appointed counsel during interrogation is a question of substance which the Supreme Court of the United States has not previously directly decided.

Judge Cabaniss, the magistrate before whom Petitioner was taken after his formal arrest, testified that the warning he gave was that set forth in State's pretrial Exhibit No. 1

(Trial Exhibit No. 4), which appears to be substantially the language[-43] of Article 15.17, V.C.C.P. Neither Article 15.17 nor State's pretrial Exhibit No. 1 (Trial Exhibit No. 4) include any provision for advice, or advice, to the Petitioner that he has a right to consult with an attorney prior to making any statement. It is interesting to note that Article 38.22, V.C.C.P., providing the conditions of admissibility of a confession, requires that the person taking the statement warn the Defendant that "he has the right to have a lawyer present to advise him either prior to any questioning or during any questioning. . ." (Emphasis supplied), Subdivision 1(c) (1).

The person who took the statement, Assistant District Attorney Tatum, testified that he did not go over the entire warning with the Petitioner (Tr., Vol. II, p. 144, Vol. III,

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-43. Obviously "boiler plate", however.

p. 209), and that he did not tell the Petitioner anything other than what was set forth in the body of the confession, the warning there being substantially the same as included in State's pretrial Exhibit No. 1 (Trial Exhibit No. 4) (Tr., Vol. III, pp. 208-209, pretrial State Exhibit No. 3, Trial Exhibit No. 5).

Not only does there appear no direct testimony that the Petitioner was given what actually many lawyers and judges would feel is the most important single advice he could have; that is that he could consult with a lawyer prior to making a statement, but a fair reading of the testimony would reflect that he was given quite the contrary impression.

Judge Cabaniss testified that he warned the Petitioner that he didn't have to give an interview "with either the officers or with any member of the District Attorney's office, or anybody officially connected with the case, and if he did decide that it would

be to his best interest to give an interview, that he would have a reasonable time in which to get an attorney. . . ." (Emphasis supplied) (Tr., Vol III, pp. 199-200).

We find it significant that the careful Trial Judge, in his Amended Findings and Conclusions of Fact and Law on the issue of the voluntary nature of alleged confession of Petitioner, changed his original findings and conclusions only in the following regard: In his original findings, the Trial Judge in addition to finding that the Petitioner was warned in accordance with the provisions of Article 15.17 by both Judge Cabaniss and the Assistant District Attorney, the Honorable Tommy Tatum, in his finding and conclusion No. 9 found "That prior to making and signing said confession, the Defendant intelligently, knowingly and voluntarily chose to waive his right of assistance of legal counsel" (Tr., Vol. I, p. 20), whereas in his Amended Finding

and Conclusion No. 9, the Trial Court finds "That prior to and during the making and signing of said confession, the Defendant knowingly, intelligently and voluntarily waived all his legal rights of which he was duly warned of the said Tommy Tatum and the said John Cabaniss" (Tr., Vol. I, p.23). (Emphasis supplied)

Miranda vs. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 Sup. Ct. 1602, 10 A. L. R. 3d 974 (June 13, 1966), reflects the view that an accused in custody is entitled to a clear explanation of his right to counsel prior to making any statement, expressions to this effect being found on pages 444 and 474 of 384 U. S.

Furthermore, on page 472 of 384 U. S., the Supreme Court in Miranda characterized the warning of "the right to consult with a lawyer and to have a lawyer with him during interrogation. . .[as] an absolute prerequisite to

interrogation. No amount of circumstantial evidence that the accused may have been aware of this right will suffice to stand in its stead." (P. 472 of 384 U. S., 722 of 16 L. Ed. 2d)

The Fifth Circuit in Fendley vs. United States, 384 F. 2d 923 (November 2, 1967), set aside a conviction precisely because, although the FBI agent advised the defendant that he had the right to consult an attorney or anyone else before making a statement, and that, if he did not have any money to obtain an attorney, that the court would appoint one for him when he went to court, the defendant was not advised, "as Miranda requires, of his right to have court appointed counsel present during the interrogation" (pages 923-924).

The Texas Court of Criminal Appeals held, erroneously, that Petitioner "was advised of his right to counsel prior to and during the making and signing of the

confession . . . and, that he knowingly, intelligently and voluntarily waived his right to counsel."[-44]

The Trial Court not only did not make these findings, vital in the application of Miranda vs. Arizona, 384 U. S. 436, 86 Sup. Ct. 1602, 16 L. Ed. 2d 694, but rather pointedly omitted making any such findings. The Texas Court of Criminal Appeals inferred that Petitioner was "advised of his right to have counsel present prior to an interview"[-45] Petitioner's possible inference that he had such a right would not be sufficient to satisfy Miranda, according to the Fifth Circuit's views as expressed in Atwell vs. United States, 398 F. 2d 507 (1968).

However, the Texas Appellate Court

-44. Appendix, pp. 10-11.

-45. Appendix, pp. 11-12.

did not find (nor did the Trial Court) that Petitioner had been advised of his right to court appointed counsel during interrogation.

Its judgment affirming the Trial Court was not decided in accord with Miranda vs. Arizona, supra.

CONCLUSIONS

1. One recalls that the Texas Court of Criminal Appeals in Weeks vs. State, 417 S. W. 2d 716, 719 (third rehearing denied 14 June, 1967) certiorari denied, 389 U. S. 996, held that "Until the Supreme Court of the United States holds that the rule announced in those cases [Wong Sun vs. United States, 371 U. S. 471, 83 Sup. Ct. 407, 9 L. Ed. 2d 441, and Miranda vs. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 Sup. Ct. 1602, 10 A. L. R. 3d 974 (June 13, 1966), and Preston vs. United States, 376 U. S. 364, 84 Sup. Ct. 881, 11 L. Ed. 2d 777] apply in voluntary consent cases, we will adhere to

our former holdings that the fact that Appe - lant was under arrest at the time he consented to the search would not render inadmissible the fruits of the search."

One also recalls that Miranda in The Tempest exclaimed "Alack, what trouble was I then to you," and Prospero responded "O a cherubim thou wast, that did preserve me!" -46

2. We respectfully submit that the Supreme Court of the United States should grant a Writ of Certiorari to the Court of Criminal Appeals of Texas, and review the questions herein presented in this petition.

Respectfully submitted,

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-46. Act I, Scene 2